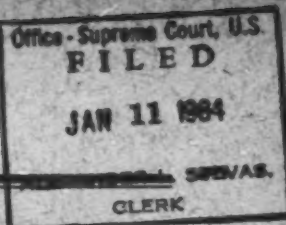


No. 83-740



In the Supreme Court of the United States

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED, INC., ET AL., PETITIONERS

v.

ROGER M. BALDWIN, ETC., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the district court improperly excluded evidence proffered by petitioners at the preliminary injunction hearing.

2. Whether the Corps of Engineers complied with Section 110(f) of the National Historic Preservation Act, 16 U.S.C. 470h-2(f), before issuing a permit for construction on the Delaware River.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2)¹ is not reported. The bench opinion of the district court (Pet. App. A7-A64)² is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on July 5, 1983. A petition for rehearing was denied on August 2, 1983 (Pet. App.

¹ Petitioners have filed two differently paginated copies of the Appendix. The page numbers herein refer to the xeroxed, 169 page version.

² The district court adopted (Pet. App. A35-A36) almost all of the Proposed Findings of Fact of the Neshaminy Water Resources Authority reprinted at Pet. App. A71-A113.

A3-A4), and the petition for a writ of certiorari was filed on October 31, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The National Historic Preservation Act §110(f), 16 U.S.C. 470h-2(f) (NHPA), provides:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

STATEMENT

Petitioners instituted this action in the United States District Court for the Eastern District of Pennsylvania on November 2, 1982, seeking review of the issuance by the United States Corps of Engineers (Corps) of a permit to the Neshaminy Water Resources Authority (Neshaminy) for the construction of a water intake structure and pumping station on the Delaware River at Point Pleasant, Pennsylvania. The permit was issued pursuant to the Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. 403, and the Federal Water Pollution Control Act § 404, 33 U.S.C. (Supp. V) 1344 (Clean Water Act). Petitioner also requested a preliminary injunction to prevent the planned commencement of construction in January 1983.

1. The Corps permit covers but one small part of a comprehensive plan for the construction of facilities for the withdrawal, diversion and use of water from the Delaware River that has been developed

by the Delaware River Basin Commission (Commission) over the last 20 years in order to meet the water resources needs of the Delaware River Basin area.³ The basic plan approved by the Commission is for water to be diverted from the Delaware River by means of a pumping facility and intake structure at Point Pleasant, Pennsylvania. This water is to be used to supplement water supplies in Bucks and Montgomery Counties, Pennsylvania, and to provide water, when that becomes necessary, to the Limerick Generating Station in Montgomery County.

The Commission's overall plan has been subjected to extensive administrative and judicial review over the last 20 years. The present project is the result of a 1966 study of the Neshaminy Creek Basin by the Pennsylvania Department of Environmental Resources, the United States Soil Conservation Service, Bucks County and Montgomery County. The plan for this project was approved by the Commission and included in the Delaware River Basin Comprehensive Plan on October 26, 1966. In 1971, the Commission plan was amended to include an enlarged Point Pleasant Pumping Station supplying approximately 150 million gallons per day (mgd) for Limerick

³ The Commission was created by the Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 *et seq.*, of which the United States and the States of New York, New Jersey, Pennsylvania and Delaware are signatories. Pursuant to that compact, the Commission is granted "broad responsibility and control over planning and allocating the water resources of the entire Delaware River Basin, including both surface and ground waters." *Delaware Water Emergency Group v. Hansler (Delweg)*, 536 F. Supp. 26, 28 (E.D. Pa. 1981), *aff'd*, 681 F.2d 805 (3d Cir. 1982).

and Neshaminy's municipal water users. The Commission filed an environmental impact statement (EIS) in 1973, which concluded that the proposed project would be beneficial to the watersheds of both creeks involved and not detrimental to the Delaware River, provided that various express conditions concerning the control and use of water contained therein were followed. Pet. App. A73-A75.

During the late 1970's, study of the present and the contemplated future water needs of the area continued. Although the contours of the project remained basically the same, population projections compiled by the Commission in 1978 led Neshaminy to prepare a new environmental report in order to reevaluate the project as then constituted. As a result, Neshaminy submitted to the Pennsylvania Department of Environmental Resources an application to modify the previously granted permit because of a decreased need for supplemental water, reducing the Point Pleasant withdrawal from 150 mgd to approximately 95 mgd. In 1978, this permit was issued, along with an extensive report by the Pennsylvania Department of Environmental Resources analyzing and justifying the issuance of the permit. Pet. App. A75-A77.

Meanwhile, aspects of this project had also been undergoing review by the federal government. In 1973, the Atomic Energy Commission (AEC) prepared an EIS regarding the proposed Limerick Generating Station, including the Point Pleasant Pumping Plant and the transmission lines needed to transport water to Limerick. In 1974, the Nuclear Regulatory Commission (NRC), which had succeeded to the licensing functions of the AEC (88 Stat. 1233), granted a construction permit to Philadelphia

Electric for the Limerick plant. The validity of this permit was affirmed after judicial review. *Environmental Coalition of Nuclear Power v. NRC*, No. 75-1421 (3d Cir. Nov. 12, 1975). Finally, in 1976, the United States Soil Conservation Service prepared a final EIS encompassing the entire water plan for the Delaware River Basin area. Pet. App. A77-A78.

2. In 1979, Philadelphia Electric and Neshaminy filed with the Commission applications for approval of their portions of the proposed transmission system, including the Point Pleasant Pumping Station. After the preparation of an extensive environmental assessment, the Commission issued a "negative declaration," finding that the proposed project would have no significant adverse effect on the environment and that the preparation of a separate EIS was not necessary. In August 1980, the Commission published its "Final Environmental Assessment for the Neshaminy Water Supply System" and granted the applications of Philadelphia Electric and Neshaminy, subject to certain express conditions and limitations. Pet. App. A78-A80.⁴

These Commission approvals were challenged in the *Delweg* litigation. Plaintiffs there claimed that there had been a failure to comply with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). The district court disagreed, finding that the numerous environmental assessments

⁴ In May 1981, the Commission completed an additional environmental study—the Delaware River Basin Comprehensive (Level B) Study—which also encompassed the plans for the Point Pleasant Pumping Station to withdraw 95 mgd for use at Limerick and the North Branch Water Treatment Plant. *Delweg*, 536 F. Supp. at 43-44.

of the proposed project were thorough, reliable and up-to-date. *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26, 48-49 (E.D. Pa. 1981).⁶ This decision was approved on appeal without opinion (681 F.2d 805 (3d Cir. 1982)).

3. In December 1980, Neshaminy submitted to the Corps applications for approval of two aspects of the planned pumping facilities and associated systems—the construction of the Point Pleasant intake structure and the rechannelization of Pine Run Creek. In connection with its consideration of these applications, the Corps received numerous comments from the public and from federal and state agencies.⁶

⁶ In that decision, the district court did not, as petitioners claim (Pet. 7-8), rely on the assumption that further EISs would be compiled by the Corps and the NRC in connection with this project. The court rejected the claim of plaintiffs that the sighting of shortnose sturgeon, an endangered species, in the Delaware subsequent to the Commission's environmental assessment mandated the preparation of an EIS. The court noted that the record did not show that the project would jeopardize the habitat of such species. The court pointed out in addition that the effect of the project on the shortnose sturgeon could be assessed by the Corps in considering the permit for the intake structure. Finally, the court noted that the NRC would prepare an EIS in connection with the Limerick operating permit, which could also consider that matter. *Delweg*, 536 F. Supp. at 46. As predicted by the district court in *Delweg*, the Corps did fully consider the effect of the project on shortnose sturgeon in connection with its issuance of the permit for the intake structure (Pet. App. A124). These effects were also considered by the NRC in connection with its review of a request for an operating permit for Limerick. NRC, *NUREG 0974, Draft Environmental Statement Related to Operation of Limerick Generating Station, Units I and II*, at 4-51, 5-36 (June 1983).

⁶ Comments and opinions were received from the Environmental Protection Agency, the National Marine Fisheries Service of the National Oceanic and Atmospheric Adminis-

In addition, the Corps consulted with the Pennsylvania Historic Preservation Office and the Advisory Council on Historic Preservation.⁷

After reviewing these comments and all previous environmental reviews that were before the Commission, the Corps issued its environmental assessment of October 14, 1982 (Pet. App. A142-A160). It determined that the issuance of the permit did not constitute a major federal action and that the installation and operation of the water intake, conduit and pumphouse would not significantly affect the human environment. Therefore, on October 25, 1982, on the basis of its Statement of Findings, the Corps issued permit No. NAPON-R-80-534-3 to Neshaminy (Pet. App. A114-A141). The Commission reserved action on Neshaminy's application for a permit for the rechannelization of Pine Run Creek.

tration, the Fish and Wildlife Service of the Department of the Interior, and the Advisory Council on Historic Preservation (Pet. App. A123-A125). The Pennsylvania Department of Environmental Resources referred to the Corps a detailed environmental assessment on the project in connection with its issuance to Neshaminy, on September 2, 1982, of Dams Safety and Encroachment permits for the Point Pleasant intake structure construction. Comments were also received from the Pennsylvania Fish Commission and the Pennsylvania State Historic Preservation Office. Pet. App. A125-A126.

⁷ This consultation resulted in a Memorandum of Agreement with those agencies that sets out steps to be taken by Neshaminy and the Corps in order to limit the effect of the intake structure's construction and operation on the historic values of the area. The Pennsylvania Canal, which will be crossed by the project, is a national historic landmark, and Point Pleasant has been nominated to the National Register of Historic Places (Pet. 42).

4. Petitioners' complaint in the instant action named as defendants numerous federal, state, and Commission officials. It challenged the issuance of the construction permit by the Corps, alleging, inter alia, violations of NEPA, the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, and the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, and sought a preliminary injunction against construction of the intake structure. After initial briefing, including various motions by the defendants to dismiss portions of the complaint, to deny the motion for preliminary injunction, and to limit the evidentiary record, the preliminary injunction hearing commenced on November 30, 1982, and continued through December 10, 1982. As an initial matter, the court ruled that review would be limited to the administrative record (Pet. App. A164):

to determine whether or not, under either a reasonableness standard or an arbitrary and capricious standard the agency somehow misapplied the law, misinterpreted the evidence, overlooked certain testimony, or unreasonably reached no significant impact determinations.

The court further held that the burden would be on petitioners to show that the Corps' environmental impact study was improperly prepared or issued. It accordingly held that testimony or evidence outside the administrative record might be introduced, in the court's discretion, to support petitioners' allegations that the administrative record was deficient (Pet. App. A165-A166). Furthermore, the court adopted as binding the decision in *Delweg*, and ruled that its consideration would be limited to those issues that had not been considered in the Commissioner's environmental assessment approved in *Delweg* (Pet. App. A166).

The court heard extensive arguments of counsel, and received as evidence numerous documents relating to issues that petitioners contended had not been adequately considered by the Corps. In addition, Richard McCoy, an employee of the Fish and Wildlife Service proffered by petitioners, testified regarding the concerns of that agency about the construction of the Point Pleasant intake structure (C.A. App. 2536-2584). Finally, after determining from petitioners' counsel that there was no further evidence that petitioners wished to present at this preliminary stage, the court reviewed and ruled upon the exhibits offered by the parties (C.A. App. 2997-3123).

On December 15, 1982, the district court issued its decision (Pet. App. A7-A64) from the bench. The court dismissed petitioners' claims under the National Historic Preservation Act, and Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), the Clean Water Act, and the Rivers and Harbors Appropriation Act of 1899, as well as against certain named individuals and state agencies (Pet. App. A5-A6, A11-A14).⁸ Assuming (Pet. App. A10) that petitioners could amend their complaint to assert a claim under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (APA), the court then denied the motion for a preliminary injunction resting on the NEPA and APA claims (Pet. App. A6, A15), finding no abuse of discretion or failure to consider adequately other agency views (Pet. App. A15-A16).⁹ Accordingly, the court

⁸ Petitioners do not here challenge these dismissals.

⁹ The court found that many of petitioners' claims had been before the court in *Delweg*, and that petitioners were estopped from relitigating those claims (Pet. App. A16-A17). It found the new issues raised by petitioner to be without

found that petitioners were not entitled to a preliminary injunction because they had shown no likelihood of success on the merits, and respondents had shown that they and the public would be severely harmed if the project did not go forward as scheduled (Pet. App. A36-A37).

5. Petitioners appealed only the denial of the preliminary injunction, presenting the same substantive issues raised in the district court. In addition, petitioners challenged the district court's evidentiary rulings, claiming the court improperly had limited its review to the Corps' administrative record, and had refused to permit them to present evidence not in the Corps' record to show that the Corps' environmental assessment was inadequate. The court of appeals affirmed the district court's decision by judgment order (Pet. App. A1-A2).

merit, concluding, inter alia, that the Corps had not violated Section 110(f) of the NHPA. Because the Corps properly relied on the Commission's determination, based on an adequate consideration of alternatives, that the location of the intake structure at Point Pleasant was the only feasible one, the court found that the Corps was not required by Section 110(f) to consider again alternatives outside that area. Accordingly, the Corps' only responsibility under Section 110(f) had been to take adequate action to minimize impact on the Pennsylvania Canal, located at Point Pleasant, which the court found it had done (Pet. App. A18-A19, A26-A27, A46-A52). The court also found that the Corps had adequately consulted with the Fish and Wildlife Service. The Fish and Wildlife Service had raised no new concerns, and its failure to refer the matter to a higher authority to resolve such disagreements (as provided in a Memorandum of Understanding between the Corps and Interior) indicated that it did not see any significant adverse impacts on fish from the project (Pet. App. A25, A27).

ARGUMENT

Petitioners have not shown any reason why this Court should depart from its usual practice of declining to review interlocutory orders of the courts below. In any event, the decision below is correct, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners ask this Court to review the denial of a preliminary injunction. This Court will not undertake such interlocutory review "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W. R.R.*, 148 U.S. 372, 384 (1893); accord, *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). Petitioners have made no such showing. They raise only two issues here—whether the district court at the preliminary injunction hearing improperly excluded evidence which was not part of the Corps' administrative record (Pet. 16-39), and whether the district court properly interpreted the Corps' duties under the NHPA (Pet. App. 39-56). Neither issue is foreclosed by the denial of the preliminary injunction—instead, both can be raised at the trial on the merits, and, if necessary, on appeal from a final decision on the merits. Ultimately, petitioners will be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of any final judgment against them.

2. In any case, the decision below is correct. Despite petitioners' claim to the contrary (Pet. 20-21), the

district court here did not exclude all evidence outside the administrative record. Instead, it adopted petitioners' view that extra-record evidence is admissible to identify important matters not considered by the agency.¹⁰ After noting that judicial review in cases such as this is generally limited to the administrative record, the court held (Pet. App. A165):

Testimony outside of the administrative record is not precluded in my opinion as a matter of law; the Court has discretion to permit it, where it would tend to advance specific allegations by the plaintiffs that the administrative record is deficient, so as to render the decision made by the administrative agency without evidence and without consideration of the various environmental considerations imposed under the regulations and statute upon the agency to review, analyze and consider.

Furthermore, although petitioners baldly assert otherwise (Pet. 20), the record amply demonstrates that the district court admitted almost all their ex-

¹⁰ Petitioners incorrectly suggest that the district court, in environmental cases, should permit a more extensive use of extra-record evidence in reviewing agency adjudicatory decisions not based on an adversary record (Pet. 16-20). This Court has consistently stated that such review must be based on "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-420 (1971). Even where the administrative record is found inadequate to support the agency's decision, this Court has prohibited remedial evidentiary proceedings in the reviewing court, holding instead that inadequate records must be remanded to the agency for supplementation. *Vermont Yankee Nuclear Power Corp. v. NRDC*, *supra*; *Camp v. Pitts*, *supra*.

trinsic evidence. Petitioners offered 91 documents as evidence: only 20 were excluded. Of these 20, only 7 apparently were excluded solely because they were not part of the Corps' record.¹¹ Petitioners do not assert that any of these documents was critical.¹² The district court admitted 60 of the documents offered by petitioners,¹³ 15 of them over the objection of the government that they were not part of the

¹¹ Nos. 25 (C.A. App. 3023-3026); 30 (C.A. App. 3028-3029); 35 (C.A. App. 3032-3033); 37 (C.A. App. 3034-3036); 53 (C.A. App. 3054-3064); 54 (C.A. App. 3064-3065); and 74 (C.A. App. 3086-3087).

The remaining 13 documents were excluded for other reasons. Nos. 8 and 21 were excluded because they were draft documents and addressed an issue (the Pine Run rechannellization) that was not part of the consideration of the Point Pleasant permit (C.A. App. 3006-3008, 3021-3022). Nos. 24, 63 and 86 were excluded because they were not complete documents (C.A. App. 3023, 3077-3078, 3115-3117). No. 26 was excluded because counsel had not presented it to the court during the preliminary injunction hearing and, therefore, had laid no foundation upon which the court could rule as to its admissibility (C.A. App. 3026-3027). No. 39 was excluded because it was offered on a purely legal issue for which the taking of evidence was unnecessary (C.A. App. 3038-3040). No. 40 was excluded as irrelevant (C.A. App. 3040-3041). Nos. 42 and 75 were excluded as unnecessary and cumulative (C.A. App. 3042-3043, 3088-3091). No. 62 was excluded as work product (C.A. App. 3075-3077). No. 85 was excluded as hearsay (C.A. App. 3106-3115). No. 91 was excluded as not probative (C.A. App. 3118-3121).

¹² Instead, they claim only that "[c]ritical documents which had not been included in the Corps of Engineers 'administrative record' * * *, were refused admittance except by the largesse of the court" (Pet. 20).

¹³ The remaining 11 documents were not admitted because they either were missing or were duplicates of other documents.

administrative record.¹⁴ Petitioners' "Hearing Plan" noted 19 possible witnesses, but indicated that their testimony would be duplicative of materials presented to the Corps (C.A. App. 191). Petitioners proffered only two of these witnesses at the preliminary injunction hearing. One of those witnesses, Ricard McCoy, was heard by the court (page 9, *supra*). The other was not heard because his testimony would have been duplicative of evidence already in the record (C.A. App. 2393). Thus, the district court allowed petitioners broad leeway in presenting evidence to support their contention that the Corps failed to consider important environmental matters.

3. Petitioners' other claim—that the Corps failed to fulfill its responsibilities under Section 110(f) of the NHPA (Pet. 39-56)—is equally without merit. They contend that the Corps refused to consider any alternative to crossing the Pennsylvania Canal at Point Pleasant, but instead improperly deferred to the consideration of alternatives previously completed by the Commission, which chose the Point Pleasant crossing site before the passage of Section 110(f) and, therefore, could not have applied the required historical preservation considerations (Pet. App. 45-46, 49-56). Petitioners also argue (Pet. 46-49) that, even if the Point Pleasant crossing was the only prudent and feasible alternative, the Corps failed to minimize harm to the canal there.

a. The Corps' consideration of alternatives fully complied with its responsibilities under Section 110(f) of the NHPA. That section by its terms requires only that agencies that take action adversely affecting a National Historic Landmark "to the maximum ex-

¹⁴ Nos. 3, 6, 7, 10, 14, 31, 33, 34, 36, 38, 43, 59, 61, 72, and 80.

tent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark" and allow the Advisory Council an opportunity to comment on the undertaking.¹⁵ The legislative history confirms the plain statutory language. It makes clear that prudent and feasible alternatives should be considered by the agency, but that Congress did not require a finding of no such alternative as a mandatory initial step without which the agency may not proceed. The House report on this Section states H.R. Rep. 96-1457, 96th Cong., 2d Sess. 38 (1980):

Although the Committee deleted a mandatory requirement that an agency first determine that "no prudent and feasible alternative for such undertaking exists," the Committee does intend for agencies to consider prudent and feasible alternatives.

Thus, NHPA, like NEPA, is a procedural statute. It is designed to protect our nation's cultural heritage by assuring that a good faith *consideration* of preservation values is made before agencies take action that could adversely affect a landmark. See Fowler, *Federal Historic Preservation Law: National Historic*

¹⁵ Contrary to petitioners' suggestion (Pet. 44, 47-49), Section 110(f) is distinctly different from Section 4(f) of the Department of Transportation Act, 49 U.S.C. 1653(f). The latter Section flatly prohibits the agency from approving a project that crosses public parkland unless it initially makes a two-part finding: first, that there is no prudent or feasible alternative; and second, that the program includes all possible planning to minimize harm to the parkland. In any event, the Corps' action here would satisfy even the stringent requirements of 49 U.S.C. 1653(f), under which an alternative may be rejected if it is "reasonably determined" to be imprudent. *Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79, 85 (5th Cir. 1976).

Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law, 12 Wake Forest L. Rev. 31 (1976).

Nothing in Section 110(f) prohibits the Corps from deferring to the decision of the Commission, the agency with overall responsibility for the project, that there was no prudent and feasible alternate crossing site outside of the Point Pleasant area (Pet. App. A132). The Commission, after extensive study of environmental and other factors (see pages 3-6, *supra*), concluded that there was no other reasonably possible place to cross the canal than Point Pleasant. The Corps properly relied on this judgment in issuing the permit necessary for completion of a part of the project.¹⁶ The Corps fulfilled its statutory obligation to consider alternatives by studying alternatives within the Point Pleasant area, since alternatives outside that area were not prudent or feasible.

Within the Point Pleasant area, the Corps gave full consideration to alternative ways to protect the historic values of the site. It considered five possibilities—abandoning the project, relocating the project in the southwest, southern or northern portions of the area, and installing an intake conduit over the canal (Pet. App. A132-A133, A154-A155). Each of these alternatives was rejected for various reasons as not

¹⁶ Deference to the Commission in the overall planning of the project is required by the Delaware River Basin Compact, Pub. L. No. 87-328, § 15.1(s)(1), 75 Stat. 713. However, the Corps' deference to the Commission's determination regarding feasible locations for the crossing did not improperly cede its statutory responsibilities under the NHPA to the Commission, as petitioners suggest (Pet. 49-56). Instead, having accepted the Commission's judgment about the impracticality of relocating the crossing, the Corps carefully addressed historic preservation concerns within the area.

feasible, and the location proposed by Neshaminy was found to be "virtually the only feasible one,"¹⁷ and "the most practicable."¹⁸

b. Furthermore, contrary to petitioners' claim (Pet. 46-49), having found the Point Pleasant crossing to be the most feasible, the Corps made extensive efforts to minimize harm to the canal from the project. Most significantly, the Corps incorporated into its permit to Neshaminy a Memorandum of Agreement that it entered into with the Pennsylvania State Historic Preservation Officer (representing the owner of the canal) and the Advisory Council on Historic Preservation (the federal entity charged with responsibility for ensuring compliance with the NHPA). The Memorandum outlines extensive efforts that must be made by Neshaminy during the construction of the project to minimize harm to the canal (C.A. App. 2042-2050).¹⁹

Despite petitioners' attempt to paint this case as one in which the Corps, through inaction, evaded its duties under the NHPA, it is clear that the Corps amply fulfilled its duty to consider historical values in issuing a permit to Neshaminy.

¹⁷ Pet. App. A132-A133.

¹⁸ Pet. App. A155.

¹⁹ The Corps thus fulfilled precisely those duties "deferred" to it by the Commission in its 1980 Environmental Assessment, to which petitioners refer (Pet. 50). In that assessment, the Commission simply noted that the Corps should be the lead agency in consultations with the Advisory Council. (See Pet. App. A95-A96.)

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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JANUARY 1984